

A (Moral) Prisoner's Dilemma: Character Ethics and Plea Bargaining

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I. INTRODUCTION

Plea bargains are the stock-in-trade of the modern American prosecutor's office. The basic scenario, wherein a defendant agrees to plea guilty in exchange for a reduced sentence, is familiar to viewers of police procedurals. In an equally famous variation on the theme, the prosecutor requests something more than an admission of guilt: leniency will only be forthcoming if the defendant is willing to cooperate with the prosecutor in securing the conviction of another suspect. In some of these cases, the defendant is a low-level criminal who has information on a high-level malefactor who is of more interest to the police. In others, the defendant and the person she is asked to testify against are of the same level in a criminal hierarchy, but evidentiary weaknesses induce the prosecutor to seek the aid of one suspect in order to convict the other. In this latter version, the classic tactic of film detectives is to offer the bargain to *both* defendants in the hopes that one will crack and agree to reveal what he knows about the other. The defendants could either be in custody for different crimes or be accomplices in the same offense.

The last variation (involving accomplices) is the subject of this article. To be clear, the cases I wish to discuss involve two or more partners in crime, guilty of the same offense, and each offered leniency in exchange for her cooperation in convicting the others. I take issue with the prosecutorial tactics in these cases because of the risk they create of punishing the comparatively virtuous person more than the comparatively vicious one for the same acts. As I will argue, it is the less honest¹ person who is more likely to accept the prosecutor's deal, leading

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¹ The sense in which I use the word "honest" throughout this Note is not limited to mere truth telling or refraining from lies. Rather, I use it in that broader sense which overlaps with words like "integrity," "honor," and "trustworthiness." This usage is reflected in the Oxford English Dictionary: "Of persons . . . [t]hat deal[] fairly and uprightly in speech and act; sincere, truthful, candid; that will not lie, cheat, or steal." THE OXFORD ENGLISH DICTIONARY (2d ed. 1989). I prefer this usage because I believe it reflects the actual integration of traits like trustworthiness, integrity, and honesty (in the simple truth-telling sense). If she is honest, a woman will not only avoid lying but will normally keep her promises, safeguard friends' secrets, and refuse bribes. If one disagrees with me on this point, the argument should nonetheless carry if "trustworthiness" is substituted for

the more honest person, who resisted temptation, to suffer greater penalties.²

I intend for this project to be an assessment of accomplice plea bargaining from the perspective of character ethics. Character ethics is the branch of moral philosophy concerned with what makes for a good person rather than good deeds or good states of affairs.³ Philosophically speaking, it is those concerned with character who ought to be worried about accomplice plea bargaining. Even so, the ideas presented here about good character are hardly exotic. One need not be a philosopher to value honesty or be concerned when the state rewards it with the short end of the stick.

Some of the character-ethics vocabulary that I use may be confusing to non-philosophers, especially since words like "virtue" and "vice" have different meanings in popular usage. First, I will use the words "virtue" or "virtuous" and the phrase "good character" interchangeably. The word "vice" simply denotes the opposite of virtue, i.e., bad character. Correspondingly, someone who is "more vicious" than another person simply has worse character, and likewise, someone who is "more virtuous" than someone else has better character than that person. Hence, comparing Tom and Andy, we could equally say that Tom is more virtuous or that Andy is more vicious. In neither case would we be saying that Tom or Andy is virtuous or vicious absolutely.

II. ARGUMENTS AND EXAMPLES

A. *Is there honor among thieves?*

In order to show that accomplice plea bargaining risks disparate punishment of the comparatively virtuous criminal, it is necessary to first establish that there is such a thing as virtue amongst criminals. If all lawbreakers were completely devoid of virtue, then there would be no problem of disparate penalties for honorable accomplices. The succeeding paragraphs aim to show that this is not the case, i.e., that "criminals" are not uniformly, indistinguishably bad. Rather, virtue is distributed amongst them in varying degrees, just as it is in the social mainstream.⁴

"honesty."

² Note that I qualify my thesis by stating that the prosecutorial tactics only create a *risk* of objectionably disparate punishment. This is because, in any particular instance, it may be the more virtuous person who agrees to cooperate rather than his more vicious counterpart, even if on the whole, we can expect the more vicious person to be the one to betray his partner for his own advantage. In short, virtuous people sometimes do vicious things, and vicious people sometimes do virtuous things even if the virtuous are usually more virtuous than are the vicious.

³ E.g., ROSALIND HURSTHOUSE, ON VIRTUE ETHICS 1 (1999) ("'Virtue ethics' is a term of art, initially introduced to distinguish an approach in normative ethics which emphasizes the virtues, or moral character, in contrast to an approach which emphasizes duties or rules (deontology) or one which emphasizes the consequences of actions (utilitarianism).").

⁴ I place the word "criminals" in quotation marks above because I mean to reference a certain

The notion that criminals are all equally devoid of virtue is belied by the uneven distribution of good character in society at large. Consider the case of judges. It is true that by and large judges are men and women of good character. It is equally true that some judges possess better character than others. Consider the imaginary cases of Regina and Victor. Regina is a justice on her state's high court. Outside her work and home life, Regina plays bridge with a group of friends every other weekend. One day, Regina's usual partner Christine—tired of losing—suggests collusion at next weekend's gathering, but Regina politely refuses. Her colleague on the bench, Victor, would have responded differently. While he is scrupulous in the observation of his judicial duties, Victor is not so conscientious outside the courtroom. On the golf course, the balls he hits that land a few feet outside the fairway have a habit of finding their way back on to it before he takes his next swing.⁵

The fact that Regina does not stoop to cheat at bridge while Victor is willing to cut corners playing golf shows something about their characters: *ceteris paribus*, Regina is a more honest person than Victor. At the same time, neither one is, on the whole, a person of bad character. On the contrary, we hope and expect our judges to be people of very good character, and we can assume that, cheating at golf aside, both Regina and Victor fit that description. To summarize, it is true that even amongst the most virtuous, quality of character varies by degrees.

Can we not expect the same principle of differentiation observed at the highest rungs of the ladder of character to hold true at the bottom as well? Just as there are judges of good character who are less virtuous than other judges, there are also criminals of bad character who are nonetheless more virtuous than other crooks. In the next section, I will provide an example of two such partners in crime.

B. *Two Partners in Crime*

Tracy and Louisa attended the same high school and still live in the same small East Texas town. Acquaintances but never friends, the two women found themselves chatting at a small get together in the living room of a mutual friend. On the news, Tracy heard about a refund scam perpetrated by an advisor to the nation's President at several Washington-area Target stores. The gist of the

conception of criminality—to wit, that criminals represent a social type of their own or that they are confined to the underclass—without also endorsing that conception. The objection I am aiming to forestall—that criminals are a group of people devoid of virtue—assumes that criminals are a special class, and so I accept that characterization *ad arguendo*. Otherwise, I find the conception of criminals as a separate genus of people suspect: people of all walks of life break the law everyday and in an instant, any person may fall and commit a heinous felony like murder. Individuals in the social mainstream break the law regularly, not simply by jaywalking, but by downloading mp3s, selling marijuana to their friends, or drinking three glasses of beer and driving. At the extremes, a married model citizen may prove vulnerable to jealous rage and its homicidal side effects.

⁵ In other words, the judge's favorite club is the foot wedge.

politico's flimflam was to buy merchandise from the store and leave with it but then immediately return with his receipt, take another of the same item off the shelf, and proceed to customer service for a refund. Tracy thinks the scam would be even harder to detect with two people, and Louisa agrees.

The scheme goes swimmingly at first. For over a year, the two make good money working together. They even improve on the original grift by making the "returns" at different Target stores across the eastern half of the state, traveling everywhere from Sulphur Springs to Beaumont. From spending all this time together, Tracy and Louisa naturally grow closer. After "work," they socialize, and when traveling on "business," they each leave their children with Louisa's mother.

This comfortable situation continues for months before the two are finally caught at a Target in suburban Dallas. After Tracy returns to the store with a new receipt, the police swarm the car with Louisa inside. Store security picks up Tracy as she walks away from customer service. The women are both booked and taken to the police station. Although the police caught the pair red handed this time, they were only returning an iPod worth less than \$300. From communicating with Target management, however, the assistant district attorney leading the retail fraud task force suspects the true extent of their crimes.

Determined to obtain the evidence necessary to convict for something more serious than a \$300 theft, the prosecutor offers the same deal to both women: in exchange for testifying as a witness for the state at trial, the prosecutor promises to pursue a lesser charge. He presents the offer to each woman and her attorney separately. He emphasizes to them that "this is a limited time offer," insinuating that the other is close to accepting the bargain.

Each woman's attorney takes her aside and advises that she accept the offer. This is the best deal she can hope for, they are told, and the only way to avoid spending significant time in prison. The decision is hard to make for both women. Each has children and is concerned about their welfare. In the end, concern for her children and fear of prison life moves Tracy to tell her lawyer to take the deal. Louisa is also concerned about her kids and does not relish the idea of going to jail. However, she is also mindful of what Tracy will lose if she chooses to cooperate and feels guilty at the thought of betraying a friend who has placed trust in her. Louisa instructs her attorney not to accept the deal. When the two are later sentenced, Louisa receives a multiyear prison term while Tracy is sentenced to a long term of probation.

C. Copping a Plea, A Matter of Character

The choice faced by the two women in our example of accomplice plea bargaining is nothing if not ethically freighted. My object in this section is to demonstrate that the decision a person makes in such a scenario is tied to her character. Specifically, the person who refuses the deal is likely to be more honest than the person who accepts it.

Relationships between partners in crime are relationships involving trust. In this respect, they are no different than relationships between business partners or political comrades. Working together to achieve a common goal requires the members of a group to rely on their fellows to carry out their own roles in the joint enterprise. In other words, each person must place confidence in the others, trusting that he or she will adhere to the norms and expectations of the group. In the complete absence of trust, extended cooperation is difficult, if not impossible to sustain.

This principle holds despite the fact that criminals are often ethically deficient. It may be the case, for instance, that some criminals' penchant for violence or keen eyes for self-interest (and observing the likely effects of self-interest on others) enables them to threaten or manipulate others into obtaining what they need from them. There are, however, definite limits to these powers. Past a certain point, no person is ruthless or cunning enough that he can wholly dispense with trust in his relationships with people whose cooperation he needs to achieve joint ends. To borrow a point from Thomas Hobbes, no man is so strong that he cannot be killed by even the weakest man while he is sleeping.⁶

Besides the practical imperative that forces people working together to place their trust in each other, there are the sympathetic bonds that tend to form when people spend time in close contact working on the same team. In the example of Tracy and Louisa, they started as acquaintances but became friends as they continued to cooperate. In this respect also, criminal enterprises are no different than their legitimate counterparts. On a sports team, people are often brought together who have no prior history. Yet, by the end of the season, they feel as close to each other as old friends. In the same way, people who collaborate to scam a department store or traffic cocaine can also become friends. Friendship entails both concern for the other's well-being and an understanding that that concern is reciprocated. This too is a form of trust.

For a group of people in a common criminal enterprise, the trust between them includes some expectation that each will not betray the other to authorities. The success of the joint venture depends on avoiding the attention of the state, and each participant stands to suffer greatly if his involvement is revealed to law enforcement. As such, there is a reciprocal expectation (perhaps limited)⁷ that

⁶ Cf. THOMAS HOBBS, *LEVIATHAN* 93 (A.P. Martinich & Bryan Battiste eds., Broadview Press 2d ed. 2002) (1651) ("For as to the strength of body, the weakest has strength enough to kill the strongest, either by secret machination or by confederacy with others that are in the same danger with himself.").

⁷ A Journal Editor draws my attention to the possibility that participants in a criminal enterprise will expect each other to "betray" once it becomes advantageous for one of them to do so. I cannot deny that this is a real possibility. Whether or not such an understanding exists in a given group turns on the particulars of the criminal enterprise and the culture that it inhabits. Amongst some who commit crime, there may be a mutually recognized point at which the rule switches to "every man for himself." Admittedly, this switch may come when a member is apprehended by authorities. In this scenario, choosing whether or not to inform ceases to be a matter of trust, and the considerations I raise about encouraging dishonesty via plea bargaining do not apply. That said, it is

each will not harm the other by informing.

Turning state's evidence against an accomplice thus can be a violation of trust. At least where someone has accepted the trust reposed in her, such a breach of faith is usually thought to be immoral. For example, the bond of trust amongst members of a sports team includes an expectation that each player will play her hardest to help the team win. If Kelly is at the free throw line, there is an expectation that she will do her best to make the shot. If she intentionally misses in order to avoid hurting the feelings of her cousin who plays for the opposing side, she has violated the trust of her teammates. Intuitively, this violation of trust is unethical or, at least, a *prima facie* wrong.⁸ When the people involved are criminals, the breach of faith itself remains equally immoral. For the sake of neat conceptualization, violations of trust can also be conceptualized as a violation of an implied promise and thus subsumed to the familiar principle in favor of promise keeping. While Kelly may have never told her teammates that she would always try to do her best on the court, her continued participation on the team expressed and affirmed that proposition to her teammates all the same.

Actions are indicative of character because they are manifestations of character, a point recognized by philosophers and lay people alike. On the philosophical side, a virtue is traditionally characterized as a habit of thought, feeling, and *action*.⁹ The virtuous person is in the habit of performing virtuous deeds because his thoughts and feeling are bent in that direction.¹⁰ He not only

plausible and possible (for the reasons I present) for trust to prevail between lawbreakers and for that trust to encompass situations where one of their number has been apprehended. I would add as well that the same skeptical posture about the extent of trust between criminals may be adopted towards other groups. In the case of a sports team, it is possible that teammate's expectations of trust halt at the point where one player's individual advantage (a scholarship opportunity, for example) clashes with the interests of the team (winning that night's game). This possibility does not detract from the fact that the existence of a team (or any other cooperative enterprise) requires and engenders trust as a general matter.

⁸ It could be only a *prima facie* wrong if, for instance, Kelly's cousin is dangerously depressed and is very emotionally invested in the outcome of the game. In such a case, it seems plausible to say the following: Kelly violated the trust of her teammates and that was wrong, but in this case, the wrong was outweighed by the good done or harm avoided so that, all things considered, her action was morally correct. Thinking in terms of *prima facie* duties that can be outweighed is not the only way to understand conflicting ethical obligations but is one with philosophical currency. *E.g.*, DAVID ROSS, *THE RIGHT AND THE GOOD* 41 (Philip Stratton-Lake ed., 2002) ("Every act therefore, viewed in some aspects, will be *prima facie* right, and viewed in others, *prima facie* wrong, and right acts can be distinguished from wrong acts only as being those which, of all those possible for the agent in the circumstances, have the greatest balance of *prima facie* rightness . . .").

⁹ *See, e.g.*, HURSTHOUSE, *supra* note 3, at 108 ("The virtues (and vices) are all dispositions not only to act, but to feel emotions, as reactions as well as impulses to action . . . In the person with the virtues, these emotions will be felt on the *right* occasions, towards the *right* people or objects, for the *right* reasons . . ."). The idea goes back to Aristotle. *See id.* ("Aristotle says again and again that the virtues are concerned with actions *and* feelings.").

¹⁰ *Cf.* ARISTOTLE, *NICOMACHEAN ETHICS* 11 (Terence Irwin trans., Hackett Publishing Co. 2d ed. 1999) ("Moreover, the life of these active people is also pleasant in itself . . . [E]ach type of

understands the reasons why he should act a certain way, but feels it to be proper as well. Feeling that something is the right thing to do means taking joy in the task and its accomplishment, and it means being distressed or saddened by seeing it neglected or the opposite done.¹¹ The fact that she enjoys doing the right thing makes it so that the virtuous person will do so readily and willingly, without having to think the matter over in detail every time.¹² For the virtuous person, doing the right thing is truly a habit in the sense that it is done consistently and spontaneously, as if it were an instinct or a reflex. In sum, the fact that virtuous thought, feeling, and action are intertwined makes it correct to draw inferences from actions to traits and vice versa.

The offerings of virtue theorists are consistent with common sense. If a person acts a certain way, we assume that he is a certain way. As an example, Fred Rogers is thought by all to be a kind and compassionate person. Mr. Rogers is thought to be a kind man because his actions, particularly the gentle manner in which he speaks, are taken to indicate that he possesses the corresponding personality traits. Correspondingly, if we are told that a new friend is a very angry person, then we expect that he will lay on his horn if someone cuts him off in traffic.

Violating a person's trust is no different from other acts in being indicative of the actor's character. Specifically, I contend that it is an indicator of honesty. I use the word "honesty" to denote a virtue broader than mere truth telling. This view of honesty finds support in the work of prominent virtue ethicist Rosalind Hursthouse, who also takes an expansive view of what honesty entails.¹³ An honest person will not tell lies, but the virtue extends to other, less obvious behaviors. If she plays cards, an honest person does not cheat because cheating is also a kind of wrongful deception. She will not engage in sharp business practices, for instance, selling a car to an unwitting buyer without disclosing a major transmission problem.¹⁴ Honesty embraces traits captured by words like "honor" and "integrity" as well. The honest person is not a hypocrite, but strives for coherence in her words and deeds. She will not take bribes or allow prejudice to affect the discharge of official duties. It also includes trustworthiness. If a trust has been placed in her, whether formal or informal, the honest person will strive to keep it.

Informing on a partner in crime is a violation of trust and, as such, indicates

person finds pleasure in whatever he is called a lover of; a horse for instance, pleases the horse-lover . . . Similarly, what is just pleases the lover of justice, and in general what accords with virtue pleases the lover of virtue.").

¹¹ Cf. *id.* ("Virtuous conduct gives pleasure to the lover of virtue.").

¹² Cf. HURSTHOUSE, *supra* note 3, at 11 (describing honest people as willing to do honest deeds "readily, eagerly, unhesitatingly, scrupulously, as appropriate"); *id.* at 92, 136 (explaining how the virtuous person, who does the right thing happily and easily, nonetheless acts from principle without explicitly making moral judgments).

¹³ Cf. *id.* at 10–12.

¹⁴ See, e.g., *id.* at 10 (detailing that an honest person is someone you can confidently buy a used car from).

dishonesty. The opposite action, refusing to inform, indicates honesty. Accordingly, a partner in crime who refuses to turn state's evidence is likely to be more honest than the partner who agrees to inform. If the cooperator is rewarded with a lesser sentence, then the more honest person is likely to be punished more severely than her less honest counterpart.¹⁵

To resist this conclusion, a critic could well object that the argument has been moving too fast. After all, is it not the case that agreeing to cooperate with the prosecution is actually the ethical course and an action indicative of virtue? The person who chooses to cooperate demonstrates respect for the law and contrition. It is one's civic duty to report crime and assist law enforcement. It is also the case that turning state's evidence usually entails making a confession of one's own and not just fingering one's accomplices. As such, the cooperator is doing the right thing by admitting and perhaps repudiating his past misdeeds. Recognizing that what one did is wrong and that others are suffering because of it is demonstrative of a renewed sensitivity to others' rights and thus indicative of virtue and not of vice.

The trouble with this line of argument is that it ignores the incentives and motives operating in the accomplice plea bargaining scenario. When Tracy decides that she will cooperate with the prosecutor, she is thinking about suffering in prison and the hardship to her family. She has not had a sudden change of heart about her criminal activity. If she regrets what she had done, it is not contrition born of a bad conscience she feels; rather, it is the kind of regret that comes from recognition that one took a path that proved to be imprudent. The person who neglects to lock his doors and sees his house burgled feels regret but a different kind of regret than the repentant burglar who has now recognized the immorality of theft.

Since Tracy's decision to cooperate is motivated by the leniency promised by the prosecutor and not by any sense of civic duty or genuine contrition, her actions do not indicate civic virtue or a repentant heart. To the contrary, it indicates she was not honest enough to resist the carrots and sticks presented to her. Both Tracy and Louisa fear prison and have beloved children who depend on them; and yet, Louisa resists. Thinking in terms of character, what this shows is that the virtue of honesty is better developed in Louisa than it is in Tracy.¹⁶ Although Louisa is just as tempted to cooperate, there is a countervailing disposition in her that wins out. This opposing disposition is a virtue, a habit of thought, feeling, and action that

¹⁵ Again, I use the qualification "more likely" throughout because there are occasions where the more vicious person acts virtuously and the more virtuous person behaves viciously. It cannot be guaranteed then that the cooperator is the less honest individual, even if usually this is the case.

¹⁶ If Louisa did not have children while Tracy did, for instance, the case could be different. In that situation, Tracy could be more honest, but her honesty would be outweighed by her concern for her children. In this scenario, Louisa could be equally honest or even less honest and yet be the one who refuses to cooperate because her honesty need not outweigh concern for offspring in order for her to take the honest action.

favors the honest course and shuns the dishonest one. In psychological terms, this means that she both accepts in the abstract that it is wrong to betray Tracy's trust and that she feels a sense of disgust—of displeasure or even pain—at the thought of breaking faith with her erstwhile partner. For such a person, a violation of trust comes only with great difficulty.

A further objection is that more character traits than just honesty are implicated in a person's decision to cooperate. Two partners in crime may be equally honest but one will collaborate because he is a diabetic and knows that life will be especially hard for him in prison. The diabetic has no less regard for trust and promise keeping as his healthy counterpart and no less an aversion to lying or breaking faith with a friend. For him, however, the temptation is greater because of his sickness, and so the same amount of honesty that suffices in one man to keep him silent is insufficient to stop another from talking to the prosecutor.¹⁷ Admittedly, this complicates the portrait I have drawn which conveniently places Louisa and Tracy in pretty much the same circumstances. Nonetheless, since *ceteris paribus*, it will be the more honest person who stays quiet and the less honest person who informs, the thesis that the less honest person is more likely to cooperate and receive a lighter sentence stands.

III. CONCLUSIONS AND RESPONSES TO OBJECTIONS

A recent *New York Times* opinion piece bluntly titled "Go to Trial: Crash the Justice System" vividly illustrates the huge scope of plea bargaining in this country.¹⁸ Working from the statistic that 90% of criminal cases are never tried before a jury, author and attorney Michelle Alexander imagines what would happen if every criminal defendant insisted on his or her right to a full-dress trial.¹⁹ Her plausible answer: courts and prosecutors would be at a total loss to process the massive wave of new cases going through a full adversarial jury trial.²⁰ For my purposes, Alexander's article is a reminder of the practical needs militating in favor of the present system.

While I assume that accomplice plea bargaining of the sort I have discussed in this piece represents only a fraction of the bargains prosecutors make each year, there are other practical reasons weighing in plea bargaining's favor besides sheer

¹⁷ The idea for this point about the complexities of moral motivation comes from Nomy Arpaly's most recent book. NOMY ARPALY, *MERIT, MEANING, AND HUMAN BONDAGE: AN ESSAY ON FREE WILL* 6–16 (2006). To be clear however, her point does not deal with particular virtues and is concerned with evaluating the praiseworthiness or blameworthiness of particular actions. *Id.* at 6. Her example is a person with major depression who fails to return a borrowed book. *Id.* at 15–16. This person is not necessarily lacking in moral concern; it is just that the respectable amount of moral concern she possesses is insufficient to move her to act under the weight of mental illness. *Id.*

¹⁸ Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES, March 11, 2012, at SR5.

¹⁹ *Id.*

²⁰ *Id.*

scale. A main one is the importance of plea bargaining as an investigatory tool, especially for the investigation of certain crimes which lend themselves to secrecy or of criminal organizations which cultivate it. To be frank, the kinds of investigations I have in mind are those we see in the movies, where a drug kingpin or leader of *la cosa nostra* is only brought to book with the aid of an informant from within his own circle. Otherwise, the chief malefactors are insulated well enough from their crimes that cases against them cannot be made in court. This notion of how plea bargaining functions to help cops and prosecutors make cases is not just a Hollywood trope, however. On the contrary, it is a factor recognized by many writers on the advantages and disadvantages of plea bargains.²¹

Bearing all this in mind, my objective in this paper is to describe a flaw in accomplice plea bargaining and not to call for its abolition. I certainly do not deny that there are practical considerations which militate in favor of retaining it. My aim is simply to describe the flaw, both for the sake of its own interest to the ethically minded, and so that it may be placed on the ledger with the other “cons” to be weighed in due course.

To my mind, punishing the more virtuous to a greater degree than the more vicious for the same offense is a *prima facie* problem. The intuition is that this state of affairs is unfitting: there is a mismatch between the assignment of punishments and the virtue of the citizens. In technical terms, it offends what philosophers call distributive justice. Distributive justice is identified with Aristotle’s famous definition of justice as proportionality between a person’s worth and the good or bad things he receives.²² Honesty is a good, and more of it is better than less of it. That being the case, the person with more is entitled to better treatment than the person with less. This claim, all other things being equal, is not a controversial proposition, and yet accomplice plea bargaining is likely to produce the opposite outcome.

Now there are some philosophers and lay people who may profess not to care about character. On the other hand, there are some who care about character a great deal. Though it is not a commonly held position today, there have been some thinkers who argued that the purpose of the state is the development of virtue in the citizens.²³ For these theorists, the objective of the ideal state is to facilitate and cultivate the development of virtuous individuals. This principle would extend to criminal-justice policy. A justice system which deliberately took steps with a high chance of rewarding dishonesty would not be in keeping with the criteria for criminal justice in the character-building state. At a minimum, the state would be

²¹ See, e.g., Michael L. Rich, *Lessons of Disloyalty in the World of Criminal Informants*, 49 AM. CRIM. L. REV. 1493, 1493 (2012).

²² ARISTOTLE, *supra* note 10, at 71–72 (explaining that justice consists in a distribution of goods proportionate to the worth of individuals).

²³ E.g., ARISTOTLE, *THE POLITICS AND THE CONSTITUTION OF ATHENS* 75 (Stephen Everson ed., Cambridge University Press 1996) (“[P]olitical society exists for the sake of noble actions, and not of living together.”).

sending the wrong message to its citizens, declaring that it cares not for virtue and vice and will nonchalantly punish the relatively virtuous more than the comparatively vicious. Beyond this, there is the problem that the state is encouraging vice and discouraging virtue by incentivizing the one and penalizing the other. Strictly speaking, this is not my thesis, although it is suggested by the same phenomenon. The traditional position in virtue ethics is that virtuous actions build virtue and vicious actions build vice—just like other habits. From the perspective of the character-building state, it is obviously unacceptable for it to be encouraging betrayal given that such acts nourish bad character.

Finally, there is something twisted and cruel about deliberately putting a person to a choice between her conscience and her freedom. Tracy, we imagined, was not someone who made the decision to turn state's evidence lightly. There are, however, some people who do so easily, with utter indifference to their former partners or even malice in their hearts against them. When the prosecutor offers to make a deal with such an awful character, his only hesitation will involve just how good of a deal he can bargain to obtain. Now contrast this person with someone like Louisa who is honest or who has tender feelings and wishes not to harm another human being by increasing the amount of time that person will spend in prison. She is caught between the demands of her compassion or her honor on one hand, and the prospect of years of misery behind bars on the other. Moreover, Louisa must also be mindful of her duties as a mother. The thought of violating one's principles or bringing harm to one's former partner in crime (who could be a close friend or even a close family member as well) is tortuous for the woman of conscience. The same is true for the fear of prison; its deprivations are at least as miserable for the saint as they are for the sinner. In sum, the perverse reality is that the more honest or compassionate a person is, the more she will suffer from the dilemma the prosecutor has fashioned.²⁴

I turn now to canvass some potential objections to my thesis and offer my replies. The first such objection is similar to the worry considered at the outset—that there is no such thing as virtue among criminals because criminals are uniformly devoid of virtue. To a philosopher, this sounds like the “unity of the virtues” thesis, which holds that no person is truly virtuous unless he is fully virtuous.²⁵ In other words, there is no such thing as being partially virtuous. This means that a person cannot possess one virtue but lack another, i.e., someone cannot be compassionate and at the same time cowardly.²⁶ In the case of criminals, a believer in the unity of the virtues might say that it is impossible for a murderer, who is brutal or intemperate, to also be honest.

²⁴ The dilemma for the compassionate person holds even in those cases in which informing ceases to be a matter of trust for a group of criminals because each expects the others to inform if apprehended. See *supra* note 7.

²⁵ E.g., Susan Wolf, *Moral Psychology and the Unity of the Virtues*, 20 *RATIO* 145, 145 (2007) (discussing the idea's pedigree).

²⁶ See, e.g., *id.* (canvassing examples).

My response to the objection from the unity of the virtues is threefold. As an initial matter, I am ready to disclaim adherence to any narrow definition of virtue ethics which would compel acceptance of the unity thesis. A common argument in support of the unity of the virtues is that there is one virtue—practical wisdom—that is necessary for all the others.²⁷ The man with practical wisdom has good judgment, and that good judgment will cause him to choose rightly in all areas of his life.²⁸ Without it, he readily goes astray, but with it, he will not waiver from the virtuous course of conduct. Practical wisdom has a central role in Aristotle's virtue ethics, and it is Aristotle's system that is usually thought of as *the* canonical virtue ethics.²⁹ There are, however, alternative approaches to virtue ethics that are not grounded in Aristotle.³⁰ While the term "virtue ethics" is an apt name for these theories in that they, like Aristotle's system, focus on character rather than acts or consequences, these theories can just as well be called "character ethics" if the term "virtue ethics" needs to be reserved for systems in line with Aristotle's original theory. In the same spirit, my points about the relationship between character and accomplice plea bargaining do not hinge on anything especially Aristotelian.

My second response is that adherence to the unity thesis is far from universal, even amongst those who consider themselves Aristotelian. Rosalind Hursthouse, for one, is suspicious of the unity thesis and lends her support instead to the "weak unity thesis."³¹ According to the weak unity thesis, the reasons for virtuous actions are indeed connected.³² For example, one of the reasons in favor of being *brave* and leaping into a cold river to save a drowning child is that a person is suffering, and suffering is to be minimized. At the same time, one of the reasons in favor of being *compassionate* and excusing a student with the flu from your class is that a person is suffering, and suffering is to be minimized. Since virtue entails acting for the right reasons or with the right thoughts, having one virtue means appreciating a reason implicated in several others. At the same time, people may suffer from what Hursthouse calls "blind spots" and fail to appreciate that a reason on which they act in one circumstance is equally applicable to another.³³ Louisa, for instance, may believe in telling the truth but be blind to the lies involved in the Target scam because she thinks of Target as an impersonal corporation, not a living

²⁷ E.g., HURSTHOUSE, *supra* note 3, at 153–54 (discussing the "Aristotelian idea that each of the virtues involves practical wisdom").

²⁸ See, e.g., *id.* ("[F]or the possession of the single virtue of practical wisdom will carry with it the possession of them all." (quoting ARISTOTLE, NICHOMACHEAN ETHICS 1144b–1145a (Terence Irwin trans., 2d ed. 1999))).

²⁹ See *id.* at 8 (treating non-Aristotelian systems as relative unknowns).

³⁰ *Id.* (mentioning Nietzschean theories of virtue ethics among others).

³¹ *Id.* at 156.

³² See *id.* at 154–55 ("The same sorts of judgments about goods and evils, benefits and harms, what is worthwhile and what is relatively unimportant crop up across the ranges.").

³³ *Id.* at 155.

person who can be lied to or betrayed. Hursthouse's approach preserves the intuitions about practical wisdom that support the unity thesis but, at the same time, comports with the data of ordinary experience in regard to the variegated character of individuals.

Third and finally, our own experience belies the unity of the virtues. A favorite example of mine is the judge who is honest but is not compassionate. This judge is upright and never takes bribes. He is scrupulous in applying the law and intellectually honest in the opinions he produces. At the same time, however, he is lacking in compassion. He performs his functions with bureaucratic sobriety and efficiency and never with a second thought for the defendants sentenced in his court. If he is a federal judge, at sentencing, he will strictly apply the sentencing guidelines, counting the credits and demerits, before assigning the prescribed number of months. Deviating from this procedure and using his considerable power as an Article III judge to reduce the sentence never even enters his mind. The reason is that he lacks empathy and the prospect of suffering for the convicted is not salient to him. Thus, where other people are struck by pity and benevolent impulses, this judge is unmoved. Examples of this sort are not hard to come by. We know of brave firemen who are degenerate gamblers and compassionate politicians who are dishonest when it comes to their marriages. Criminals are no different; it is not hard to imagine a hotheaded killer who is also fiercely loyal to his friends and family.

The next objection harkens back to a challenge I addressed earlier that incentivizing cooperation actually rewards virtuous behavior because reporting law-breaking to the authorities is what the good citizen does. Graduate student Jerry Green presented me with a twist on this line of argument. Suppose that a person has both the virtue of citizenship and the virtue of honesty.³⁴ Assume as well that he is in a scenario like that faced by Louisa and Tracy. The good citizen in him urges him to accept the prosecutor's offer and turn state's evidence, but the honest person in him is unwilling to betray his accomplice. These two virtues are in conflict with each other until the prosecutor's offer of leniency sweetens one course of action enough to tip the scales in favor of cooperating. Here, a spoon full of sugar has helped the medicine go down. The man acts as the good citizen would act, and the state has rewarded or encouraged the virtue of citizenship. Consequently, it must be recognized that plea bargaining can sometimes incentivize a virtue, just not the virtue of honesty.

My response to this objection is to fall back on the plausible assumption that criminals who are confronted by prosecutors with offers of reduced sentences are not motivated to assist the authorities out of a sense of civic duty. In other words, there is no reason to think that prosecutors are simply nudging reluctant would-be good citizens the last few yards because the necessary virtue is, in the vast majority

³⁴ I have a feeling this argument generalizes to all cases where someone has the virtue of citizenship, but in which it is not strong enough to produce cooperation of its own force. In other words, it need not be limited to cases where citizenship is vying with honesty.

of cases, nowhere in sight. Of course, the question itself would have to be settled by empirical evidence. My intuitions and feelings of what is plausible in these scenarios do give me confidence that my notion of what motivates cooperators would be borne out by such investigation. As I argued previously, the recently-captured criminal may feel regret, but this regret should not be confused with a genuine change of heart about the rectitude of his criminal conduct. Anger at one's captors is to be expected before contrition. Conciliation and propitiation may take anger's place (at least on the surface) when a person turns state's evidence, but this is not the result of sudden inspiration with a spirit of respect for the law.

Even where the captured criminal is sincerely repentant, this need not be evidence of a newfound respect for law, for it may simply be the fruit of a troubled conscience. In this vein, a Journal Editor points out that the example crime I have chosen, a fraud scheme perpetrated on a corporate retailer, is likely to disguise the repentant motive in the cooperating criminal. Those captured for other crimes, especially violent crimes like rape or homicide, are more plausibly motivated by repentance in choosing to assist the prosecutor. Although I agree with this characterization of my hypothetical crime, I do not think that the repentance we imagine a violent criminal experiencing is connected to the virtue of citizenship identified in the original objection. What is motivating here seems to be the visceral brutality of the criminal acts themselves and their corresponding moral salience. As such, it is not respect for the law or regard for the duties of citizenship that inspire someone shocked by their own violent misdeeds to confess. Significantly, this motivation to repent is unlike the virtue of citizenship in that it need not call for one to finger one's accomplice but only to confess one's own wrongs.

The last objection is that talking about character in the context of punishment is inapposite because the proper concern of the criminal law is with a person's actions and not with the person herself. This view derives philosophical support from the retributivist school of punishment theory and is reflected in rules of evidence that focus the fact-finder's attention on the present accusation by barring evidence of character and past crimes. Succinctly defined, retributivism is "the view that whether a person may be punished and, if so, to what extent are questions to be decided solely by reference to one's past legal offense."³⁵ In other words, it is a person's actions alone that warrant punishment, and the concern of the State in punishing people ought to be in fixing the severity of the penalty to match the gravity of the crime. Naturally, retributivists reject approaches to punishment that allow sanctions to be set on the basis of extraneous factors, such as the deterrent effect on other would-be criminals. Less obviously perhaps, character is another extraneous factor in the eyes of the retributivist. A good person may commit a bad action, and a rotten person may do a good deed. In either case, it is the act and not the person or her traits that are to be considered in determining the punishment due.

³⁵ Don E. Scheid, *Kant's Retributivism*, 93 ETHICS 262, 262 (1983).

A retributivist would find much to commend in American court rules excluding evidence of character at criminal trials. With some exceptions, the Federal Rules of Evidence prevent the admission of character evidence by the prosecution.³⁶ The relevant rule reads, "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."³⁷ Evidence of prior acts is similarly banned: "evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."³⁸ One justification for these rules is that they protect a person from being convicted on the basis of his criminal character.³⁹ The fear is that juries will tend to convict a person, even a person they rather suspect is innocent, simply for the sake of bringing punishment to bear on a wicked man.⁴⁰ On the other hand, these rules are sometimes justified as prophylactics to the admission of unreliable evidence.⁴¹ Per this rationale, the worry is that the jury will assign too much weight to the character evidence and come to an erroneous conclusion about guilt.⁴² In any event, the first justification tacitly agrees with the retributivist position insofar as it assumes that bad character is not alone sufficient to warrant punishment absent commission of an actual crime.⁴³ Given the example of the Federal Rules, it seems fair to say that the American criminal law is concerned with a person's actions rather than the quality of his character.

My response is that a concern with character is not incompatible with giving pride of place to actions in the criminal justice system. Indeed, I believe the retributivists are correct to insist that criminal punishments are only justified when warranted as responses for immoral deeds. This proposition—that a wrongful act

³⁶ FED. R. EVID. 404.

³⁷ *Id.* at 404(a)(1).

³⁸ *Id.* at 404(b)(1).

³⁹ See David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1184 (1998).

⁴⁰ As the Fifth Circuit explained, "[c]haracter evidence is not excluded because it has no probative value, but because it sometimes may lead a jury to convict the accused on the ground of bad character deserving punishment regardless of guilt." *United States v. Carrillo*, 981 F.2d 772, 774 (5th Cir. 1993).

⁴¹ Leonard, *supra* note 39, at 1184 (speaking of "inferential error prejudice").

⁴² In the words of Justice Jackson, "The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge." *Michelson v. United States*, 335 U.S. 469, 475–76 (1948) (footnote omitted).

⁴³ A skeptic could argue that the worry is not that people will be punished for their character, but that the factual accuracy of the jury's verdict will be distorted if juries start convicting bad people for being bad without regard to the evidence. The concern then is not so much for why a criminal is punished but for preserving the separate roles of jury as fact finder and judge as dispenser of penalties. To my mind, this seems like something only a lawyer or judge could become exercised over, leaving concern about punishing the wicked "innocent" as the more plausible basis of the rules.

is a necessary condition for criminal punishment—can be distinguished from the claim that a wrongful act is both necessary *and* sufficient to justify the imposition of penalties. The latter claim is less attractive; it requires that the state punish a person in proportion to his crime without regard to the consequences thereof, insisting that merciless or seemingly senseless harm be inflicted simply because the person deserves it for his wicked act. In contrast, the milder form of retributivism does not demand anyone be punished but, rather, denies the moral authority of the state to inflict harm unless the punished person's actions warrant the sanction imposed. This moral limitation on the power of the criminal justice system is often described as a "side constraint."⁴⁴ The liberal theorist Robert Nozick developed the concept to describe the way individual rights create boundaries, which the State may not cross, but within which the state is free to pursue its goals or values.⁴⁵ For instance, the state may wish to eliminate homophobia in society but be constrained, ethically or legally (i.e., by a constitution), from pursuing this goal by shutting down reactionary newspapers carrying bigoted messages.

The idea of a side constraint carries over to the field of criminal justice. Today, many retributivists argue that desert is a side constraint on punishment.⁴⁶ According to these thinkers, the gravity of a person's misdeed only establishes the ceiling for punishment, and other considerations, like deterrence, can be used to make adjustments below that maximum.⁴⁷ For example, a person may deserve to spend two years in prison for a robbery, but the optimal level of deterrence established by empirical studies is six months. If desert is merely regarded as a side constraint, there is no objection to sentencing her to six months.

Just as consequentialist concerns, such as deterrence, can be wedded to the side constraint view of desert, the values of character ethics can also be melded to it. For instance, a criminal justice system that affirmatively sought to build good character could also well recognize that its authority to imprison in the interests of rehabilitation was bounded at the top end by the severity of the criminal's deeds. Likewise, we can worry about the relationship of plea-bargaining practices to character without thereby forgetting that a wrongful action is the condition precedent to any invocation of the criminal justice process. When this is recognized, character ethics cannot be dismissed out of hand as inapposite to conversations about the morality of criminal justice.

⁴⁴ See, e.g., Thomas H. Morawetz, *Retributivism and Justice*, 16 CONN. L. REV. 803, 811–12 (1984).

⁴⁵ ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 29 (1977).

⁴⁶ See Morawetz, *supra* note 44, at 811 (listing it as one of three flavors of retributivism).

⁴⁷ E.g., *id.* at 812 ("[P]unishment must be fair or just, and therefore limited to those who are guilty.").

IV. SUMMARY

The original goal of this paper was to explain how accomplice plea bargaining created a risk of punishing the more virtuous to a greater extent than the more vicious. In the course of developing this narrow thesis, however, I identified other related problems. Notably, the difficulty with accomplice plea bargaining can be recast in terms of incentivizing vice and discouraging virtue. I also touched on a psychological point, namely, the perversity of a situation in which the more honest or compassionate a person is, the more he will suffer from the dilemma created by the prosecutor who forces him to choose between his conscience and avoiding additional years in prison. In spite of these several drawbacks, however, I have limited my arguments to marking these disadvantages of accomplice plea bargaining. Bearing in mind its practical value for law enforcement, I do not call for its abolition.

